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tenance, if carried too far, is socially harmful, one can understand the court's attempt gradually to differentiate the means used in carrying out such a policy into those that are lawful and those that are unlawful. The line of demarcation seems to be determined by whether a particular device employed is too effective or too likely to be subject to abuse. Adopting this test, the spying system of the Beech-Nut Co. seems to fall well within the prohibited zone.

The status of price fixing today seems to be that a manufacturer may announce the terms which he desires his dealers to make to their vendees, and refuse to supply them unless they agree to sell at that price. But after obtaining the goods, the dealer is free to disregard his promise. The only recourse of the manufacturer is to refuse to supply any further goods. According to the instant case, however, systematic endeavors to ascertain violations of the agreement may be enjoined.

THE LEGAL STATUS OF AN INVOLUNTARY DEPOSITARY.*—It is well settled in the field of voluntary deposits that a misdelivery by a depositary is a conversion,¹ unless he is unaware that he is exercising dominion over the goods.²

It is apparent that a variety of circumstances may give rise to an involuntary deposit.³ It may be caused by an innocent,⁴ mistaken, necessary, or wilful trespass of the owner. Innocent trespasses are usually occasioned by the straying of animals onto the land of another. In such a case the depositary may drive them off in a proper manner, thereby incurring no liability⁵ even though damage results.⁶ If, however, the depositary drives off the animals in an improper manner, and the owner is damaged thereby, the former is liable.⁷ At common law animals thus causing a trespass might be impounded by the depositary for *damage feasant* until the owner has made reparation.⁸ The law of *damage feasant*⁹ and of estrays¹⁰ is largely statutory to-day. The voluntary deposit rule of absolute liability for misdelivery seems clearly unjust in cases of this kind for

spiracies and combinations" as well as to contracts. (1890) 26 Stat. 209, U. S. Comp. Stat. (1916) § 8820.

* No attempt is made to cover all the causes which may give rise to an involuntary deposit.

¹ Hale, *Bailments* (1896) 243; Story, *Bailments* (9th ed. 1878) § 414.

² *Cohen v. Koster* (1909) 133 App. Div. 570, 118 N. Y. Supp. 142, two judges dissenting.

³ The term is used to include all cases wherein a party is given control over a chattel without an exercise of his own volition.

⁴ The term is used to include only trespasses which are caused neither by the act of the owner nor by his negligence.

⁵ *Cory v. Little* (1833) 6 N. H. 213; *Mitten v. Faudrye* (1627) Poph. 161.

⁶ *Carney v. Brome* (N. Y. 1894) 77 Hun 583. It is interesting to compare this case with *Leach v. Lynch* (1910) 144 Mo. App. 391, 128 S. W. 795. In the former jurisdiction no fencing statute existed but in the latter the landlord was required to fence. His failure to do so prevented his suing in trespass for the entry by the animal. In each case the animal was removed by the depositary, but in the latter the burden of establishing a proper removal was on the depositary. It seems, therefore, that a fencing statute of this kind has an effect not often recognized, viz., it shifts the burden of establishing that the removal was proper.

⁷ *Gilson v. Fisk* (1836) 8 N. H. 404 (driving too far).

⁸ 3 Bl. Comm. *211.

⁹ It is customarily required under these statutes that the animal be taken up in the vicinity of the residence of the taker up. Failure to comply strictly with the terms of the statute renders the depositary subject to a possessory action. It has accordingly been held that a taking up on the land leased by the taker up, but two miles from his residence, did not bring him within the provisions of the statute. *Mills v. Fortune* (1905) 14 N. Dak. 460, 105 N. W. 235.

¹⁰ *E. g., ibid.*

there is no basis to require that the depositary, though privileged to drive off the cattle, may deliver only at his peril, since he has not undertaken to deliver. He incurs no liability if he had reasonable grounds for believing that he was dealing with the owner.¹¹

No cases have been found which deal with the depositary's position as such when the deposit was caused by a trespass due to mistake. In such a case there would be a wrongful act on the part of the owner. Since, however, the owner here also had no intent to trespass, his legal status should be no different from what it was in the innocent trespass cases except that he might have no privilege to enter and retake his chattels.¹²

The law governing deposit by necessity¹³ seems to be undefined in Anglo-American jurisdictions. Such a case would arise when A removes his furniture to the land of B to prevent its destruction by the burning of A's building.¹⁴ In the absence of statute courts probably would not regard this as differing from a wilful trespass¹⁵ save that they might give the depositor a privilege to enter and retake his goods because of the hardship of the particular case.

Where the deposit is due to a wilful trespass by the owner, he has no privilege to enter the land of the depositary to retake his chattels.¹⁶ If he does attempt to enter, the involuntary depositary may repel him by the reasonable use of force without laying himself open to any liability.¹⁷ This does not mean, however, that the owner has lost all rights to the goods, for, it seems, if upon demand the depositary refuses both to surrender and to permit the owner to enter to retake, the owner may recover either the property itself or its value.¹⁸ It seems, as before set out, that the rule of absolute liability for misdelivery is inapplicable to a case of this kind if the depositary reasonably thought he was dealing with the true owner;¹⁹ for the depositary is privileged to rid his land of the incumbrance, and if he does so by delivering to one whom he reasonably believes to be the owner, he should not be liable.

Involuntary deposits may also be created by an act of God.²⁰ A typical case is one in which a flood washes the chattels of A onto the lands of B. It is well settled that the depositary need not suffer the goods to remain on his land, but may here also rid himself of them.²¹ The true owner, however, may enter and take the chattel without becoming a trespasser,²² probably because he is guilty of no wrong. And, at least until he has had notice, he is not charged with

¹¹ If, however, it is sought to hold the depositary for negligence with regard to the property, the standard of care applied should be that which is required of one towards a trespasser.

¹² For one should not be able to clothe himself with a right to enter another's close by virtue of his own misconduct.

¹³ Technically this would be a trespass.

¹⁴ The only modern literature on the subject is Story, *op. cit.* § 44a.

¹⁵ The reason for such a holding would seem to be that one is not privileged under the policy of our law to shift his own misfortune onto the shoulders of another.

¹⁶ *Newkirk v. Sabler* (N. Y. 1850) 9 Barb. 652 (*semble*); see *Anthony v. Haney* (1832) 8 Bing. 186, 191. It is submitted that the reason is the same as that set forth *supra*, footnote 12.

¹⁷ *Newkirk v. Sabler*, *supra*, footnote 16.

¹⁸ See *ibid.* 656, 657; *Anthony v. Haney*, *supra*, footnote 16, p. 192.

¹⁹ It is submitted that the depositary's liability for negligence should be measured by the same standard as that set out *supra*, footnote 11.

²⁰ Some statutory provisions provide expressly for deposits of this kind. N. Dak. Comp. Laws (1913) § 609; Okla. Rev. Laws (1910) § 1086; S. Dak. Rev. Code (1919) § 971.

²¹ See *Forster v. Juniata Bridge Co.* (1851) 16 Pa. St. 393, 399.

²² See *Anthony v. Haney*, *supra*, footnote 16, p. 192; *Foster v. Juniata Bridge Co.*, *supra*, footnote 21, p. 398.

any duty to remove the chattels and should not be liable even if their remaining on the land of the depositary caused damage.²³ As to strangers, the depositary has possessory rights, and may sue in trespass if a stranger enter his close to take the chattel²⁴ unless it be to save the goods for the true owner.²⁵ The depositary has no lien for services which he may have rendered in saving the chattels.²⁶ If he refuse to surrender the goods, he is, therefore, liable in trover.²⁷ It would seem that if he delivers the goods to the wrong party, reasonably believing him to be the true owner, there should be no liability.

No cases have been found involving the position of the depositary as such where the deposit is caused by the negligence of the depositor.²⁸ It has been suggested that the depositor could not enter to take his goods, and that he would be liable in trespass for any damage caused thereby.²⁹ Liability for misdelivery should be limited as in the case last discussed.

Involuntary deposits may also be caused by the negligence of the depositary. Where animals stray onto his land from an adjoining close, where the owner had a right to keep them, due to defects in a fence which the depositary was under a duty to maintain, and the depositary drives the animals into the highway where they are injured, he is liable in trespass.³⁰ Dicta in these cases state that the depositary is under a duty to drive them back into the close from which they came.³¹ Though there are no cases in point, it is submitted that the true owner should have the privilege peaceably to retake his property without being a trespasser, for a depositary should not have the power to restrict by his wrong the owner's use of his property.³² Furthermore, the depositary should both be held accountable to a high degree of care, and be liable for a misdelivery even though made to one whom he reasonably believed to be the true owner, for the situation

²³ Story seems to think that the owner should be liable for damage if he be given notice and fail to remove the goods although they were deposited by "inevitable casualty." Story, *op. cit.* § 83a. It is submitted, however, that such a rule would be unduly harsh, and doubt is cast upon it in *Foster v. Juniata Bridge Co.*, *supra*, footnote 21, p. 398. Of course the mere fact that the goods were deposited by an act of God should avail the owner nothing, where they caused the depositary damage, if the owner was negligent in not foreseeing that an act of God might cause such damage. Story, *op. cit.*, § 83a.

²⁴ *Barker v. Bates* (1832) 30 Mass. 255; see *Proctor v. Adams* (1873) 113 Mass 376, 377.

The stated reasons of the court in *Proctor v. Adams*, *supra*, seem to be that the operative facts are that the defendant entered to save the chattel for the owner. It is submitted, however, that such entry will not be held a defence to a trespass action where the circumstances are such that the owner himself would not be privileged to enter to retake the chattel.

²⁵ *Proctor v. Adams*, *supra*, footnote 24; cf. (1921) 21 COLUMBIA LAW REV. 809.

²⁶ *Nicholson v. Chapman* (1793) 2 H. Bl. 254. There is dictum in this case, p. 259, which hints that he might recover in *quantum meruit*. As to such recovery cf. *infra*, footnote 35.

²⁷ *Sutton v. Buck* (1810) 2 Taunt. 302; *Nicholson v. Chapman*, *supra*, footnote 26.

²⁸ This class comprises cases in which no immediate act caused the deposit; i. e., where negligence plus an act of God caused it.

²⁹ Story, *op. cit.* § 83a. The reason for denying the owner the right to enter as set out *supra*, footnote 12, is applicable here. It seems, however, that the owner should not be liable in trespass unless it appeared to be inevitable that his negligence would result in an entry. Case would seem the proper remedy in other cases of this kind.

³⁰ *Carruthers v. Hollis* (1838) 8 Ad. & E. 113; *Morse v. Glover* (1894) 68 N. H. 119, 40 Atl. 396.

³¹ See *Carruthers v. Hollis*, *supra*, footnote 30, p. 117; *Morris v. Glover*, *supra*, footnote 30, p. 120.

³² See *Newkirk v. Sabler*, *supra*, footnote 16, pp. 655, 656.

closely resembles that of a voluntary deposit, and the depositary is not a victim of circumstances.

There are certain cases of involuntary deposits which fall under no general class, but which should nevertheless be noticed. Such would be the case of a dog straying onto the depositary's land.³³ The depositary has no lien for keeping such an animal, and his refusal to surrender to the owner is a conversion.³⁴ It seems fair to assume that the courts will make no distinction between this case and the cases of trespassing animals as set out above.

A more frequent example of this class of cases arises when a tenant moves and leaves his chattels on the premises. The depositary has no lien for storage in such a case, but he may recover therefor in *quantum meruit*.³⁵ He is privileged to put the goods out in such a manner as is calculated not to injure them,³⁶ and, if injury occur, he is not liable.³⁷ It seems that if upon demand he refuse both to deliver and to allow an entry to retake, he is liable for their value.³⁸ Misdelivery in good faith to one whom the depositary reasonably believes to be the owner, here also should not subject him to liability.³⁹

In the recent case of *Cowen v. Pressprich* (Sup. Ct. App. T. 1922) 192 N. Y. Supp. 242, the plaintiff and defendant were security brokers. The latter ordered an X bond from the former, but by mistake the plaintiff sent a Y bond by one of his runners. The defendant's office was so arranged that those delivering bonds dropped them through a slot in a partition of an inner office. The Y bond was so delivered. The defendant promptly noticed that the wrong bond had been delivered, and called for the runner. In fact the runner had already left the office. An impostor, however, stepped in and the defendant, believing him to be the plaintiff's runner, delivered the bond to him with appropriate instructions. The impostor made off with the bond. The plaintiff recovered in trover; one judge dissented. We here have an involuntary deposit arising due to a mistake of the depositor.⁴⁰ In such a case if the property be lost without negligence, the depositary is not liable.⁴¹ As indicated above, there is no basis for imposing upon the depositary an absolute liability for misdelivery. And one English case so holds.⁴² The fact that the mistake was induced by the fraud of a third person should not increase the duties of the innocent depositary.⁴³ In the instant case, however, the depositary delivered to one whom he knew was not the owner although he believed him to be the agent of the owner. If there should be freedom from liability in the case of misdelivery to one reasonably believed to be the owner,

³³ Not a trespass.

³⁴ *Binstead v. Buck* (1777) 2 Bl. W. 1117.

³⁵ See *Preston v. Neale* (1858) 78 Mass. 222, 223, 224.

³⁶ *Stearns v. Sampson* (1871) 59 Me. 568.

³⁷ *United States Mfg. Co. v. Stevens* (1883) 52 Mich. 330, 17 N. W. 934.

³⁸ *Morris v. Pratt* (1905) 114 La. 98, 38 So. 70 (*semble*). Although this case turned on the fact that the goods were subsequently destroyed by fire, there seems no reason why the refusal to surrender did not give rise to the right of action.

³⁹ As to negligence, the rule *supra*, footnote 11, should apply.

⁴⁰ But note that there was no trespass.

⁴¹ *Consentino v. Dominion Exp. Co.* (1906) 16 Man. 563; *Howard v. Harris* (1884) 1 Cab. & E. 253.

⁴² *Heugh v. L. & N. W. R. R.* (1870) L. R. 5 Ex. 51. The case of *Hiortt v. Bott* (1873) L. R. 9 Ex. 86, may possibly be distinguished on the ground that the depositary did not exercise sufficient care in determining the one entitled. *Morris v. Third Avenue R. R.* (N. Y. 1862) 1 Daly 202, while not a case where the deposit was made by the mistake of the depositor, does turn on the question of whether or not the depositary used due care in ascertaining the owner, and, therefore, bears out the principal proposition.

⁴³ *Krumsky v. Loeser* (1902) 37 Misc. 504, 75 N. Y. Supp. 1012.

it follows that there should be a similar freedom from liability where misdelivery is to one who is reasonably believed to be an agent. In the instant case there was no evidence that the defendant depositary acted unreasonably under the customary method of conducting the business in question. It is therefore submitted that the decision is unsound.

THE EFFECT OF MOTIONS BY BOTH PARTIES FOR DIRECTED VERDICTS ON THE RIGHT TO A JURY TRIAL.—In *Mansha v. San Benito Land Co.* (Iowa 1921) 184 N. W. 345, the Supreme Court of Iowa held that though both parties moved for a directed verdict, there was no waiver of the jury trial of the issues of fact. But in *Superior Steel Spring Co. v. New Era Spring & Specialty Co.* (Mich. 1921) 184 N. W. 440, a contrary result was reached.¹ Many courts that apply the rule of the latter case assume that both parties by moving for a peremptory instruction thereby concede that there is no dispute as to the facts, and that there is no issue to submit to the jury.² Such assumption was the basis of the adoption of the rule by the Supreme Court of the United States in *Beuttell v. Magone*,³ and of the reaffirmation thereof as recently as 1919 in *Williams v. Vreeland*.⁴ Perhaps the majority of the courts which have enunciated the rule place it squarely upon the ground that the parties by making mutual motions thereby evidence an intention to waive the jury and are precluded on appeal from objecting that disputed questions of fact were decided by the court unless at some time before judgment the appellant either expressly or by conduct negatived such intent.⁵ It is submitted, however, that neither the assumption of undisputed facts nor that of an intention to waive the jury is justified.

¹ Both courts are supported by previous decisions in their respective jurisdictions. *German Savings Bk. v. Bates* (1900) 111 Iowa 432, 82 N. W. 1005; *Burton v. Ladd* (1920) 211 Mich. 382, 178 N. W. 774. And also by authority in other jurisdictions. *The Second Nat. Bk. of Hoboken v. Smith* (1918) 91 N. J. L. 531, 103 Atl. 862 (issue of fact nevertheless goes to jury); *Bankers' Surety Co. v. William Miller & Sons Co.* (1912) 105 Ark. 697, 150 S. W. 570 (court passes on issues of fact). The Michigan court, however, appears to have overlooked its contrary holding in *Lonier v. Ann Arbor Savings Bk.* (1908) 153 Mich. 253, 116 N. W. 1088, and to have perhaps misinterpreted the decisions in *St. Mary's Power Co. v. Water-Power Co.* (1903) 133 Mich. 470, 95 N. W. 554, and *Wolverine Farms Co. v. De Young* (1914) 182 Mich. 200, 148 N. W. 395, upon which it relied. The last two are said by the appellate court to be cases where the parties had acquiesced in an announcement by the trial judge that he understood a jury trial had been waived. But in fact the trial judge in the *Wolverine* case only said that, "both parties asked for a direction of a verdict," and in the *Power* case that "both parties seemed to agree that it is the duty of the court to direct a verdict in this case; the plaintiff insisting that it is the duty of the court to direct a verdict in his favor; and the defendants claim that it is the duty of the court to direct a verdict in their favor" From acquiescence in such language it is hard to understand how the appellate court could construe express or implied acquiescence in a waiver of a jury trial. The appellate court seems rather, despite its language, to hold that such motions presumptively waive a jury trial. The court in the instant case, therefore, is not totally unjustified in relying upon the *Wolverine* and *Power* cases.

² Cf. *Winchell v. Hicks* (1859) 18 N. Y. 558; *Lewis v. Jackson* (App. Div. 1921) 191 N. Y. Supp. 806 (*semble*).

³ (1895) 157 U. S. 154, 157, 15 Sup. Ct. 566. The rule as laid down in this case was dictum, but it has been consistently followed by the federal courts.

⁴ (1919) 250 U. S. 295, 39 Sup. Ct. 438.

⁵ *Southern Pacific Co. v. United States* (C. C. A. 1915) 222 Fed. 46; *Schultes v. Sickles* (1895) 147 N. Y. 704, 41 N. E. 574; *Eastern D. P. Dye Works v. Travelers' Ins. Co.* (App. Div. 1921) 190 N. Y. Supp. 822 (conduct).